Supreme Court, U.S.
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No. 10-810

IN THE

Supreme Court of the United States

UNITED STATES AND CALIFORNIA *EX REL.* O'CONNELL AND MOYERS,

Petitioners,

v.

CHAPMAN UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Respondent does not dispute the five key propositions that support granting the petition:

First, an appellate court "without power to proceed with [an] appeal" may still "exercise ... its supervisory appellate power [to] dispos[e] of the case as justice requires." *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676 (1944); Pet. 11-12.

Second, this Court exercises that supervisory power "to save appellants their proper remedies," if jurisdictional ambiguity caused them to appeal here rather than to the proper Court of Appeals, by "vacat[ing] the decree and remand[ing]" so the district court "may enter a fresh decree from which appellants may ... perfect a timely appeal to the circuit court of appeals." *Phillips v. United States*, 312 U.S. 246 (1941); Pet. 12-15.

Third, this Court has employed that "equitable vacatur" practice for at least 60 years, in 50 cases, by 30 Justices (including a current majority). Pet. 12-18.

Fourth, the parties in both *Bowles v. Russell*, 551 U.S. 205 (2007), and *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009), failed to advise this Court of that longstanding practice, which caused those cases to be decided under the misimpression that the only available options were to adjudicate the merits despite the jurisdictional defect (which was deemed improper) or to dismiss the appeal despite the equitable justification (which thus was deemed necessary). Pet. 7-10, 27-28.

Fifth, although *Bowles* and *Eisenstein* do not expressly reject equitable vacatur where, as here, a jurisdictionally untimely appeal is filed in reasonable

reliance on subsequently overruled circuit precedent, the Ninth Circuit understandably construed those cases to require dismissal. Pet.App. 2a-3a; *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949, 953 (9th Cir. 2010); Pet. 2-4.

Unable to contest these points, Respondent primarily argues that the question presented was not preserved. BIO 6-10. That, however, is clearly wrong: Petitioners' claim of entitlement to equitable relief from dismissal of their appeal was pressed and passed upon below, and there are compelling justifications for review regardless.

Respondent's secondary argument is that Petitioners' equitable vacatur cases all involved direct appeals to this Court, rather than to the Courts of Appeals. *Id.* 11-18. But that distinction is legally irrelevant. As Judge Henry Friendly cogently observed:

> We know the Supreme Court has many powers that we do not; but we can see no basis for thinking that if the Supreme Court, with its limited direct appellate jurisdiction over the district courts, can vacate a district court judgment when an appeal was not properly before it, a court of appeals, which regularly reviews judgments of the district courts, cannot.

United States v. New York, New Haven & Hartford R.R. Co., 276 F.2d 525, 545 (2d Cir. 1960)("*NY R.R.*").

The Ninth Circuit's conclusion that *Bowles* requires dismissal thus conflicts with this Court's vacatur precedents and is a critical jurisdictional error that only this Court can realistically correct. Certiorari should be granted.

I. THE QUESTION PRESENTED WAS BOTH PRESSED AND PASSED UPON BELOW AND SHOULD BE REVIEWED REGARDLESS

Respondent principally asserts that the question presented was neither pressed nor passed upon below and thus should not be reviewed. BIO 6-10. That assertion is wrong at every level.

A. Under well-settled precedent, Petitioners preserved the specific question presented here by generally claiming below that they are entitled to equitable relief from dismissal of their appeal. "A litigant seeking review in this Court of a claim properly raised in the lower courts ... generally possesses the ability to frame the question ... without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). It thus "can make any argument in support of that claim" and is "not limited to the precise arguments [it] made below." *Id.* at 534.

In *Yee*, petitioners asserting a Takings claim made a *physical* takings argument below, but not necessarily a *regulatory* takings argument. *Id.* This Court held that, even if they had *not* made that "precise argument[]" below, they "could have formulated [that] argument ... here." *Id.* at 534-35. Their "arguments that the ordinance constitutes a taking ... by physical occupation and by regulation, [were] not separate *claims*," but "rather, separate *arguments* in support of a single claim." *Id.*; *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995) (petitioner who preserved a First Amendment claim could even raise a supporting argument he "expressly disavowed" below).

Here, as Respondent itself demonstrates (BIO 7-8), Petitioners below raised the "consistent claim" (*Lebron*, 513 U.S. at 379) that they are entitled to equitable relief from dismissal of their appeal, given their reasonable reliance on controlling circuit precedent. CA9 Docket # 54, 56, 58. Indeed, not only did Petitioners request a remand so the district court could provide relief under Fed. R. App. P. 4, *id.* # 58 at 6, 17, but they even suggested remanding so that court could, under Fed. R. Civ. P. 60(b), enter "an amended judgment for purposes of renewing the appeal period," *id.* # 56 at 2, 15-17.

In short, Petitioners' claim of entitlement to equitable relief from dismissal of their appeal was vigorously pressed below. Having thus preserved that "claim," Petitioners are "not limited to the precise arguments [they] made below" and instead may "make any argument in support of that claim," including the "equitable vacatur" question now presented. *Yee*, 503 U.S. at 534.

B. "[E]ven if this *were* a claim not raised by [P]etitioner[s] below," this Court will "review ... an issue not pressed so long as it has been passed upon." *Lebron*, 513 U.S. at 379. And here, the Ninth Circuit squarely held that "*Eisenstein* applies retroactively and requires dismissal of th[is] appeal[]" and that "remand would be futile." Pet.App. 2a-3a. This holding was compelled by *Haight*, which concluded that *Bowles* and *Eisenstein* "instructed ... that concerns of equity must give way before the 'rigorous rules' of statutory jurisdiction," and thus even untimely appeals that "reasonably relied on Ninth Circuit precedent" "must be dismissed." 602 F.3d at 953. Indeed, Respondent itself describes the Ninth

Circuit as holding that this Court's precedent mandates dismissal of untimely appeals regardless of equitable justifications. BIO i ("The question presented is whether the court of appeals erred in concluding that dismissal of petitioners' untimely appeal was required by [*Eisenstein*], which held that an untimely appeal must be dismissed in precisely these circumstances.").

C. In any event, although this Court "[o]rdinarily ... does not decide questions not raised or resolved in the lower court," "the rule is not inflexible." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). And there are two compelling justifications for granting review here regardless of the scope of earlier litigation.

First, this Court has suggested flexibility is appropriate where arguments below likely would have been futile. *Id.* at 235 ("Had appellants relied on the Supremacy Clause issue as a separate ground for decision[,] it would appear that the claim would have been rejected by the District Court."). Here, speculation is unnecessary, for this Court's own precedents were the source of probable futility.

The facial import of *Bowles* and *Eisenstein* is that "concerns of equity must give way before the 'rigorous rules' of statutory jurisdiction," such that even untimely appeals that "reasonably relied on Ninth Circuit precedent" "must be dismissed." *Haight*, 602 F.3d at 953. To be sure, those precedents are technically distinguishable because the appellants failed to seek equitable vacatur relief. Pet. 7-10, 27-28. Critically, however, this Court has instructed lower courts to leave for this tribunal the adoption of such distinctions of settled precedent.

Specifically, in *Eberhart v. United States*, 546 U.S. 12 (2005) (*per curiam*), the Seventh Circuit believed a rule was jurisdictional under two of this Court's precedents, even though that characterization contradicted more recent decisions concerning over-use of the jurisdictional label. *Id.* at 14-15. This Court granted certiorari and reversed, but it factually distinguished the older cases, rather than overruling them. *Id.* at 16-18. Although the Seventh Circuit could have done likewise, this Court nevertheless *expressly commended* it for following the "prudent course" of not "upsetting what [it] took to be our settled precedents." *Id.* at 19-20. Given that this Court plainly sought to deter the Courts of Appeals from anticipating possible factual distinctions of settled precedent, it necessarily contemplated that parties would initially raise such distinctions here, as Petitioners are doing.

Second, the equitable nature of the question presented militates against any forfeiture finding. This Court routinely has exercised *sua sponte* discretion in improper appeals to award vacatur relief. Pet. 21-22. There is no apparent reason for greater rigidity in exercising certiorari discretion to review the purely legal question whether the Courts of Appeals can award such relief.

Indeed, where doing so furthers this Court's recent jurisprudential project of clarifying and cabining jurisdictional rules (Pet. 9; *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-03 (2011)), this Court has conspicuously departed from its normal certiorari practices. Most notably, even though it "ordinarily do[es] not consider questions outside those presented in the petition for certiorari," *Yee*,

503 U.S. at 535, this Court in *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), itself added the question whether a copyright requirement conceded to be jurisdictional was in fact so, and then held it was not. Pet. 25-26. Obviously, this Court has been "tr[ying] in recent cases to bring some discipline to the use of [jurisdiction]," "[b]ecause the consequences that attach to the jurisdictional label may be so drastic." *Henderson*, 131 S. Ct. at 1202.

This case presents the *simultaneous* opportunity to add some "discipline" missing in *Bowles* (due to the parties' inadequate briefing) and to reduce the jurisdictional label's "drastic" effect (by reaffirming the safety-valve of equitable vacatur). Given the relative obscurity of the equitable vacatur practice, it is unclear when this Court would have another such opportunity.

II. THE EQUITABLE VACATUR POWER EXERCISED BY THIS COURT IN DIRECT APPEALS IS NECESSARILY SHARED BY THE COURTS OF APPEALS, AND THIS COURT'S IMMEDIATE REVIEW IS NECESSARY TO REVIVE THAT IMPORTANT PRINCIPLE OF FEDERAL JURISDICTION

Respondent distinguishes this Court's longstanding equitable vacatur practice in direct appeals because this case was appealed to the Court of Appeals instead. BIO 11-18. But, as Judge Friendly observed long ago, *see supra* at 2; *infra* at 12, that procedural distinction is legally irrelevant. It thus does not: (A) resolve the square conflict between the Ninth Circuit's order and this Court's precedent; (B) justify Respondent's exaggeration of the absence of a square circuit conflict; or (C)

eliminate the need for this Court to correct the misperception created by *Bowles* that no equitable remedies are available when appellate jurisdiction is lacking.

A. The Ninth Circuit's Conclusion That *Bowles* Requires Dismissal Squarely Conflicts With This Court's Equitable Vacatur Tradition

Petitioners previously demonstrated that it *necessarily follows* from this Court's equitable vacatur practice that the Courts of Appeals have *the same power* when judicial error causes an appellant's noncompliance with the jurisdictional deadline in 28 U.S.C. § 2107:

(1) both situations *equally involve* a court that lacks appellate jurisdiction over the merits but has supervisory power to justly dispose of the case in a way that facilitates *a future timely appeal under § 2107* in the Court of Appeals, Pet. 11-12, 22-23;

(2) it is *more legitimate* for the Courts of Appeals to exercise such vacatur power, since they at least have statutory *subject-matter* appellate jurisdiction, whereas this Court has *no* jurisdiction over improper appeals, *id.* 23;

(3) reasonable reliance on circuit precedent is a *better equitable claim* than existed in many of this Court's cases, which involved *open* jurisdictional questions, *id.* 21, 23-24;

(4) the vacatur practice has a *stronger historical pedigree* than § 2107's jurisdictional treatment, *id.* 24; and

(5) Congress' *ratification* of the vacatur practice *equally applies* to the Courts of Appeals, *id.* 18-20.

Respondent fails to undermine these points.

1. Respondent's principal argument is that "every" one of this Court's direct-appeal cases "involve[d] an error in the proceedings below"—the implication being that, unlike here, vacatur was appropriate only to correct the alleged error. BIO 16. But that argument is completely wrong.

Of the 23 cases where the vacatur's basis was evident, Petitioners showed that there were 10 cases where the *only* error was the *appellant's* mistaken decision to directly appeal a valid judgment here rather than to the circuit court. Pet. 16 & nn.5-8. Oddly, Respondent itself *agrees* for 8 of them, refuting its own argument. BIO 13 & nn.8-9.

Moreover, even for the 13 vacatur cases where three-judge courts were unnecessarily convened, Pet. 12-15 & n.4, those courts did not commit *legal error*. As Petitioners explained, if a three-judge panel is convened when it is not required, that does not affect "the federal jurisdiction of the district court," but *only* whether "this Court has jurisdiction to hear the appeal," as opposed to "the Circuit Court of Appeals." Pet. 14 (citing *Okla. Gas & Elec. Co. v. Okla. Packing Co.*, 292 U.S. 386, 391 (1934)); *accord NY R.R.*, 276 F.2d at 544 (Friendly, J.).

2. Similarly, Respondent mistakenly contends that "[n]ot a single" one of this Court's direct-appeal cases "involve[d] § 2107." BIO 15. In fact, however, they *all* did, because § 2107 was the *sole* reason equitable vacatur was needed: "[b]y mistakenly appealing directly to this Court, [appellants] ha[d] lost their opportunity to have the decree below reviewed on its merits, as the time for appeal to the Circuit Court of Appeals ha[d] expired." Pet. 14 (quoting *Okla. Gas & Elec.*, 292 U.S. at 392). The

only difference is those appellants failed to satisfy § 2107 because they appealed to the wrong court, whereas Petitioners appealed to the right court but relied on controlling circuit precedent adopting the wrong deadline. That distinction, however, *supports* Petitioners. *Id.* 22-23; *see also NY R.R.*, 276 F.2d at 545 (Friendly, J.).

3. Respondent also unjustifiably contends that Petitioners are more culpable than the appellants in the vacatur cases, since Petitioners "**chose** to wait 58 days to file their notice of appeal" "when there was a clear circuit split on th[e] jurisdictional [deadline]." BIO 16. But Petitioners' reliance on *controlling circuit precedent* was more reasonable than *guessing* how *open* jurisdictional questions would be resolved, as did many appellants who received vacatur relief. Pet. 23-24. Moreover, those appellants "chose" not to file a "protective appeal" in circuit court, *id.* 24, which is less defensible than "choosing" not to appeal early to avoid expediting the briefing, *Bowles*, 551 U.S. at 223 n.9 (Souter, J., dissenting).

4. Respondent repeatedly stresses the Ninth Circuit is not *required* to provide equitable vacatur relief. BIO 11-12, 16. Petitioners agree that relief is discretionary, Pet. 20, but the Ninth Circuit never exercised its discretion, because it wrongly believed that *Bowles* and *Eisenstein* foreclosed equitable relief and required dismissal.

5. Finally, Respondent erroneously attacks the vacatur practice's legitimacy, suggesting that "any *historical* practice of engaging in 'equitable vacatur' to circumvent jurisdictional requirements is outmoded under this Court's recent precedents, including *Bowles* and *Eisenstein*." BIO 16, 18-19.

But those precedents held only that § 2107 is *jurisdictional*. Pet. 3, 7-10. Petitioners are *not* questioning that holding, *id.* 9-10, because appellate courts that concededly lack merits jurisdiction nevertheless possess supervisory power to justly dispose of the case. Pet. 11-12. That is the *whole point* of this petition: *Bowles* and *Eisenstein*, having decided the jurisdictional question, overlooked a traditional equitable remedy for jurisdictionally untimely appeals *because the parties failed to raise it*, thereby inadvertently causing lower courts to feel bound to dismiss all such appeals.

That said, *if Bowles* conflicted with the longstanding equitable vacatur tradition, the latter should prevail, since *Bowles* rests *entirely* on a *less* developed tradition. Pet. 6, 10, 24. Indeed, this Court last month unanimously reaffirmed that history is the only reason *Bowles* is exempt from "the strict definition of jurisdiction" and "bright line" test that this Court otherwise "ha[s] recommended in [its] recent cases." *Henderson*, 131 S. Ct. at 1203.

B. Respondent Exaggerates The Absence Of A Square Circuit Conflict

Although Respondent emphasizes the lack of a square circuit split, BIO 11, that is unsurprising. Since *Bowles*, lower courts' obligation to avoid upsetting this Court's precedents based on technical distinctions has effectively foreclosed the Courts of Appeals from invoking the equitable vacatur practice. *See supra* at 5-6. And prior to *Bowles*, the Courts of Appeals had no need to invoke the equitable vacatur practice in the context of untimely direct appeals, since the more straightforward (but less legitimate) "unique circumstances" doctrine was

available. Pet. 8, 27.

Furthermore, in the one context where the need did arise—*i.e.*, where the appellant mistakenly appealed to the Court of Appeals, causing the time for taking a direct appeal here to expire—the equitable vacatur practice was unhesitatingly applied. Writing for the Second Circuit, Judge Friendly held that there was "no basis for thinking that ... the Supreme Court, with its limited direct appellate jurisdiction over the district courts, can vacate a district court judgment when an appeal was not properly before it, [but] a court of appeals, which regularly reviews judgments of the district courts, cannot." *NY R.R.*, 276 F.2d at 544-45. His typically irrefutable logic applies here equally, which further bolsters the case for review.

C. Correcting The Misperception Created By *Bowles* Warrants This Court's Review Even Absent A Square Conflict

Finally, as discussed, the parties' failure in *Bowles* to advise this Court of the equitable vacatur practice caused that case to be decided in a way that effectively forecloses lower courts from employing the practice. That unfortunate result, standing alone, warrants this Court's review. This Court generally has not hesitated to correct deleterious oversights or imprecision in its cases. Pet. 27. And intervention is especially warranted here, where *Bowles*' party-induced omission hinders this Court's concerted efforts "in recent cases to bring some discipline to the use of [jurisdiction]," "[b]ecause the consequences that attach to the jurisdictional label may be so drastic." *Henderson*, 131 S. Ct. at 1202.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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